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WACHOVIA

October 28, 2004

Federal Trade Commission
FACTA Prescreen Rule, Project No. R411010
P.O. Box 1030
Merrifield, VA 22116-1030

Electronic Address: <https://www.secure.commentworks.com/Commissionprescreen/>

RE: FACTA Prescreen Rule, Project No. R411010

Dear Sir:

This letter is submitted on behalf of Wachovia Corporation and its subsidiary companies, including Wachovia Bank, National Association and its operating subsidiaries, Wachovia Mortgage Corporation and Wachovia Education Finance; and Wachovia Bank of Delaware, National Association; (hereinafter collectively referred to as "Wachovia"). Wachovia has reviewed the regulations proposed by the Federal Trade Commission ("Commission") to implement § 213 of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") concerning the right of consumers to opt out of prescreened solicitations for credit or insurance (the "Proposal"). Wachovia supports the effort of the Commission to assure that such notices "be presented in such format and in such type size as to be simple and easy to understand."¹ However, we are concerned that the format proposed by the Commission may pose legal and compliance risks related to other information and disclosures contained in the marketing message.

Prescreened Offers Benefit Consumers

Wachovia firmly believes that the prescreening process benefits both the consumer receiving the offer and the financial institution or other marketer (collectively the "marketers") that invites acceptance. The prescreening process reduces marketing costs by limiting offers of credit or insurance to those consumers who are creditworthy and would be most interested in the offer. Competitive prescreened offers also allow marketers to attract new customers who may be offered other products and services at reduced costs. Without the benefit of prescreened information, marketers would have to rely on generic mailings that would increase the number of unqualified candidates applying for credit

¹ Fair Credit Reporting Act, 15 U.S.C. 1681m(d)(2).

products and ultimately receiving rejection notices and that would annoy and alienate existing and future customers.

Prescreened marketing solicitations provide consumers with an opportunity to “comparison shop” among the product offers they receive. Consumers can choose from those products that best meet their financial needs. Interest rates remain competitive as financial marketers compete for consumer business, and “bundled” services result in further consumer cost savings. Consumers who opt out may not realize that they will have fewer opportunities to “comparison shop” among the vast array of financial services offered by many financial institutions.

The opt out process required by 15 U.S.C. 1681(m)(d)(2) and the Commission’s rules governing consumer notices² prior to the enactment of FACTA have worked effectively, while providing marketers wide latitude in designing offers of products and services. Consumers’ failure to opt-out is not indicative of ignorance of or lack of attention to the opt out process, as illustrated by the fact that consumers responded promptly and in large numbers to the Do Not Call registry without receiving personalized notices of the right to opt out of telephone solicitations. Wachovia acknowledges that consumer response to the Do Not Call Registry may have been the result of extensive publicity by the Commission and the Federal Communications Commission. However, Wachovia believes that many customers do not opt out of prescreened offers because they affirmatively choose to receive notices of available products and services. We are concerned that the Proposal may expose marketers to new risks related to appropriate disclosure and consumer understanding and will increase marketing costs.

Short Form Opt-Out Notice

The provisions of 15 U.S.C. 1681(m)(d)(2) were not changed by FACTA. The law requires that marketers provide a notice that contains two essential elements:

1. The address and toll-free telephone number of the appropriate notification system to effect opt-out; and
2. That the notice be presented in such format and in such type size and manner as to be simple and easy to understand.

Federal regulators have used the “clear and conspicuous” standard in consumer disclosures for more than 40 years. Regulators, attorneys, compliance officers and the courts have opined on what is meant by “clear and conspicuous” and while they do not always agree, consumers have benefited from the discussion, assuring that consumer protection notices are in a format that can easily be noticed and understood.

² Federal Trade Commission Rule, *Notices of Rights and Duties Under the Fair Credit Reporting Act*, 16 CFR Part 601, Appendix A.

On December 10, 2003, in an effort to create a “clear standard” among consumer regulations, the Board of Governors of the Federal Reserve proposed regulations that were intended to require a single standard for terms required to be disclosed in a clear and conspicuous manner.³ After reviewing comments from consumer groups and from the financial services industry, the Board elected to withdraw the proposal, noting that a single standard for “clear and conspicuous” may not be workable when applied to all regulations.⁴

Wachovia agrees with the Board’s determination and believes that a single, prescribed format for the short form opt-out notices may not be appropriate in all circumstances. The study conducted for the Commission by Dr. Hastak indicates only that, in the defined environment of a large shopping mall, consumers appear to be more aware of the message if a two-part, or “layered,” format is utilized. However, consumers do not receive prescreened marketing offers in a shopping mall environment; rather, consumers receive the marketing messages in a format that they can keep and to which they can refer. The study does not address whether consumers would be equally informed of opt-out rights if marketers deliver a short-form notice in other text, typefaces or formats. The study also fails to address whether the test group of consumers understood the effects of opting out of prescreened notices.

Prescreened offers contain, in addition to the marketing message, a significant amount of other information that may be required to be presented in a clear and conspicuous manner. The Schumer box,⁵ the time availability of the offer, fair housing notices, and other consumer disclosures must be presented in a clear and conspicuous manner and in a format and style that the consumer can understand. The prescribed format for the short form opt-out notice appears to be less of a consumer disclosure and more of a consumer warning that the consumer must take some affirmative action. Wachovia is concerned that the clear, conspicuous and prominent short form opt-out notice may direct the consumer’s attention away from other important terms and affect the consumer’s understanding of the terms of the offer. Wachovia believes that if Congress intended the language to be placed in such prominence, it would have legislated this change in 15 U.S.C. 1681(m)(d)(2).

³ The Board of Governors proposed rules for Regulations B, E, M, Z, and DD at 68 FR 68786 et seq.

⁴ 69 FR 35541, June 25, 2004.

⁵ The Schumer Box requires all credit card solicitations to provide card terms and conditions in a “clear and conspicuous manner,” and in tabular form. The box is named after Senator Charles E. Schumer who sponsored the Fair Credit and Credit Card Disclosure Act, amending the Truth in Lending Act. See Regulation Z at 12 CFR 226.5a(a)(2)(ii).

Wachovia believes that the short form opt-out notice is unnecessary. Moreover, if the intent of the short form notice is to direct the consumer to the long form notice, this goal may be accomplished in other ways that do not diminish the importance of other disclosures. Furthermore, the text of the short form opt-out notice also gives Wachovia concern. The Commission was charged in FACTA with adopting a rule to improve the required notice to consumers regarding their opt-out rights.⁶ The proposed language of the short form opt-out notice presumes that consumers will understand 1) the meaning of “prescreened offers of credit or insurance” and 2) the effect of opting out of future marketing messages. The text of the notice addresses neither of these issues.

Wachovia recommends that the provisions of 16 C.F.R. 642.3(a)(2)(A) be amended to delete the reference to “prominent,” as this is not required by the statute. We recommend further that 16 C.F.R. 642.3 be revised and renumbered as shown in the following text. These amendments allow for a clear and conspicuous standard for the short-form opt out notice that does not diminish the importance of other clear and conspicuous terms on the page and does not create confusion for the consumer.

16 C.F.R. 642.3(a)

(a) Short notice.

- (1) Content. The short notice shall be a simple and easy to understand statement that directs the consumer’s attention to the existence and location of the long notice. The short notice shall not contain any other information.*

(b) Form. The short notice shall be:

- (1) Clear and conspicuous.*
- (2) In a type size that is equal to or greater than the type size of the principal text on the same page;*
- (3) On the front side of the principal promotional document in the solicitation, or if provided electronically, on the first screen; and*
- (4) In a typeface that is distinct from other typeface use on the page, such as bolding, italicizing, underlining, and/or in a color that contrasts with the color of the principal text on the page, if the solicitation is in more than one color.*

To assure that consumers are directed to the important disclosure information, include the right to opt out of receiving prescreened notices, Appendix A to Part 698 should be amended to provide as follows:

English Language Model Notice: Short Notice

See other side (or other location) for important information.

⁶ 69 FR 58851, October 1, 2004.

Wachovia also requests that the Commission confirm that the placement of the short form notice on the “principal promotional document”⁷ does not require the notice to be placed on other promotional materials such as “buck slips” and similar items that may appear in other colors or typefaces. Wachovia requests that the Commission specify that the short form opt-out notice appear on the front side of the letter or other document that contains the principal terms of the promotional offer. Depending upon what is included in the mailing, this may not be the first piece of marketing material that the customer sees, but it is the most important document in the solicitation.

Wachovia also suggests that the Commission revisit the requirement that notices delivered through electronic solicitation appear on the “first page” of the notice. Depending on the format of the consumer’s computer, what appears on the “first page” of one computer may be vastly different than what appears on the “first page” another. Wachovia suggests that instead of attempting to define an electronic standard by a standard for written communication, the Commission should adopt a “safe harbor” standard for electronic communications that allows the marketer to place the short form opt-out notice in a manner that is reasonably proximate to, or included in, the main marketing message or offer. Additional requirements for variants such as typeface or other conspicuous formats that would call the consumer’s attention to the opt-notice notice would continue as requirements.

Long Form Opt-Out Notice

Wachovia generally supports the Commission’s proposal for the long form opt-out notice. However, the Commission is charged with the duty to adopt a rule that improves consumers’ understanding of their opt out rights. Wachovia submits that consumers should also understand the effect of opting out of prescreened solicitations. Therefore, Wachovia urges the Commission to modify the long form opt-out notice to permit optional language, space permitting, describing the effect of the opt out action. Wachovia suggests that the Commission modify the long form opt-out language that appears in Appendix A to Part 698 as follows:

OPT-OUT NOTICE: This “prescreened” offer of [credit or insurance] is based on information in your credit report indicating that you meet certain criteria. This offer is not guaranteed if you do not meet our criteria. If you do not want to receive prescreened offers of [credit or insurance] from this and other companies, call toll-free [toll-free number]; or write [consumer reporting agency name and address]. [Optional language: If you opt out of receiving prescreened offers, you may continue to receive other offers of [credit or insurance], but you will not receive prescreened offers from your own or from other [financial institutions or insurance companies].

⁷ 16 C.F.R. 642.3(a)(2)(C).

Traditionally, the long form opt-out notice appears on the back of the document or letter that contains an explanation of the terms of the offer, in proximity to other required disclosures such as the Schumer Box. Wachovia believes that the opt-out notice would be clear and conspicuous if marketers complied with the provisions of 16 C.F.R. 642.3(b)(2)(A) through (E). To require that the long form opt-out notice also be set apart from other text on the page and to be indented on the left and the right is redundant to making the notice appear conspicuous. Wachovia urges the Commission to remove subsection (F).

Cost and Time Estimates

The short time frame for responding to the Proposal has prevented Wachovia from performing a detailed analysis of the cost and time for designing, approving and printing prescreened offers with the prescribed language. Large financial institutions and insurers offer many products through prescreening, each of which requires the engagement of marketing, business product, legal and compliance personnel. The proposed format will create significant challenges to these teams of professionals. We can find no basis for the Commission's estimate that implementing these changes may take as little as 8 hours. This short time frame is not realistic for even one marketing offer. Large financial institutions and insurers may offer hundreds of different offers in a given year.

Further, if the Proposal is adopted as written, the marketing materials may require complete redesign so as to assure that all of the required disclosures are placed as required by regulations that govern the offer. Longer or larger documents create different design challenges and will require a greater investment of time for design. If the effective date is unchanged, marketers may have to dispose of large quantities of preprinted materials and mailers. Wachovia believes that the estimates of cost and time are significantly understated, and urges the Commission to look further into this issue.

Effective Date

In order to save costs and shorten production times, many marketers preprint part of prescreened marketing material, particularly Truth in Lending Act and Fair Credit Reporting Act disclosures on warehouse stock. Actual offers are then printed on the front of the document when a prescreened solicitation offer is made. The proposed changes in the text of the short and long form opt-out notices will require that existing stock of preprinted forms be destroyed. Further, because the specific requirements for the form, content and placement of the opt-out notices are unknown, Wachovia cannot determine whether or not it will be able to continue to use the same size document, envelope and acceptance form currently in stock. Any changes in the size of the document will increase the design time and cost of the letter package.

In order to allow financial institutions and marketers to deplete the stock of existing preprinted documents, Wachovia urges the Commission to extend the effective date of the Proposal. Marketers should be permitted to bring marketing programs into compliance at a date no earlier than 180 days after the effective date of the Final Rule. We do not believe that consumers will suffer irreparable harm if the effective date of the Rule is delayed to allow the depletion of stock and new designs to incorporate the required regulatory changes.

The Proposal makes no reference to the study being conducted by the Board of Governors of the Federal Reserve System (hereinafter the "Board") on prescreened solicitations, pursuant to § 213(e) of FACTA.⁸ The comment period for the Notice of Study and Request for Information closed on July 23, 2004, but the Board has not published results or further information on the proposed study. Wachovia believes that the proposed study may have a direct impact on the manner and form of future prescreened solicitations. Wachovia takes note of the fact that Congress required the Commission to consult with the federal banking agencies before adopting a final rule.⁹ Wachovia urges the Commission to delay publishing the final rule until it receives further information from the Board study.

Wachovia appreciates the opportunity to offer its Proposal. If the Commission has any questions, please call me at 704-715-2489.

Very truly yours,

**Michael A.
Watkins**

Digitally signed by Michael A. Watkins
DN: CN = Michael A. Watkins, C = US
Reason: I am the author of this document
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Michael A. Watkins

⁸ 69 FR 29539, May 24, 2004.

⁹ 69 FR 58861, October 1, 2004.